Supreme Court, U.S.
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No. 01-956

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. JOHN A. KING, D.O.,
Petitioner,
v.
HILLCREST HEALTH CENTER, INC.,
HARVEY DRAPKIN, D.O., JOHN B. HUGHES, D.O.,
RICHARD J. LANGERMAN, SR., D.O.,
TOM W. EWING, D.O., ANTHONY L. CRUSE, D.O.,
RAYMOND DIETER, D.O., MONA MOTZ, D.O.,
GLENN J. SMITH, D.O., AND JOE GOLDSTEIN, D.O.,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jurisdictional limitation of 31 U.S.C. § 3730(e)(4)(A), which requires a False Claims Act relator to show he is an "original source" if his *qui tam* complaint is "based upon" a prior "public disclosure," applies where the allegations of the complaint are substantially identical to the information in the public disclosure, but were not actually derived by relator from that public disclosure.

2. Whether a relator fails to satisfy the pre-filing voluntary disclosure requirement of the False Claims Act's "original source" definition, 31 U.S.C. § 3730(e)(4)(B), when the relator deliberately withholds from the government both his own identity and the identity of the alleged perpetrators of the fraud.

PARTIES TO THE PROCEEDINGS

Hillcrest Health Center, Inc., now known as St. Michael Hospital, Inc., is a not-for-profit corporation organized under the laws of Oklahoma. SSM Health Care of Oklahoma, Inc., an Oklahoma not-for-profit corporation, is the sole member of St. Michael Hospital, Inc. SSM Health Care Corporation, a Missouri nonprofit corporation, is the sole member of SSM Health Care of Oklahoma, Inc.

The remaining respondents are all individuals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT 2

REASONS FOR DENYING THE WRIT 6

I. THIS COURT SHOULD DENY CERTIORARI ON THE ISSUE CONCERNING THE MEANING OF "BASED UPON" UNDER 31 U.S.C. § 3730(e)(4)(A) BECAUSE IT DOES NOT MERIT REVIEW AND BECAUSE THE PETITIONER WAIVED THE ARGUMENT BELOW 6

A. This Issue is of Limited Practical Consequence, and this Court has Denied Certiorari in at Least Five Cases Since a Conflict in the Circuits Arose 6

B. As the Tenth Circuit Held, the Issue was Waived in the District Court 14

II. THIS COURT SHOULD DENY CERTIORARI ON THE QUESTION WHETHER A RELATOR QUALIFIES AS AN "ORIGINAL SOURCE" UNDER 31 U.S.C. § 3730(e)(4)(B) WHEN, IN HIS PRE-FILING VOLUNTARY DISCLOSURE, HE DELIBERATELY WITHHELD FROM THE GOVERNMENT HIS IDENTITY AND THE IDENTITY OF THE ACCUSED 15

A. There is no Conflict in the Circuits 15

B. The Tenth Circuit's Application of the Voluntary Disclosure Requirement is Clearly Correct 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

A-1 Ambulance v. Cal., 202 F.3d 1238 (9th Cir. 2000) 13
Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994) 12
Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001) 11
Commercial Contr., Inc. v. United States, 154 F.3d 1357 (Fed. Cir. 1998) 11
Cooper v. Blue Cross & Blue Shield of Florida, Inc., 19 F.3d 562 (11th Cir. 1994) 7, 14
Fed. Recovery Servs., Inc., v. United States, 72 F.3d 447 (5th Cir. 1995) 7, 9
Harrison v. Westinghouse Savannah River Co., 176 F.3d 776 (4th Cir. 1999) 11
Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3rd Cir. 2001) 11
Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., __F.3d __, 2002 WL 59279 (8th Cir. Jan. 17, 2002) 6, 14
Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994) 12
Searcy v. Philips Elec. N. Am. Corp., 117 F.3d 154 (5th Cir. 1997) 12
Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519 (10th Cir. 2000) 12
United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ., 161 F.3d 533 (9th Cir. 1998) 6, 7
United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717 (6th Cir. 1999) 13
United States ex rel. Chandler v. Cook County, Ill., No. 00-4100, 01-1810, 2001 WL 75859 (7th Cir. Jan. 22, 2002) 10

United States ex rel. Dhawan v. N.Y. Med. College, 252 F.3d 118 (2d Cir. 2001) 14
United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992) 7, 13
United States ex rel. Dunleavy v. County of Del., No. 00-3691, 2002 WL 111365 (3d Cir. Jan. 29, 2002) 10
United States ex rel. Dunleavy v. County of Del., 123 F.3d 734 (3d Cir. 1997) 13
United States ex rel. Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861 (4th Cir. 1999) 13
United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997) 6, 7, 14
United States ex rel. Fine v. Advanced Sci., Inc., 99 F.3d 1000 (10th Cir. 1996) 13
United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486 (5th Cir. 2001) 10
United States ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996) 12
United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994) 12
United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990) 13
United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027 (9th Cir. 1998) 12
United States ex rel. McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935 (6th Cir. 1997) . 6, 7, 14
United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh, 186 F.3d 376 (3d Cir. 1999) 6, 7, 16
United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548 (10th Cir. 1992) 5, 7
United States ex rel. Rabushka v. Crane Co., 40 F.3d 1509 (8th Cir. 1994) 13

United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996) 13, 15
United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995) 11, 13
United States ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196 (D.C. Cir. 1995) 11
United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994) 7, 8, 14
United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 9, 15, 16
United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149 (3d Cir. 1991) 13
United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899 (5th Cir. 1997) 12
United States ex rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991) 13
United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999) 7, 13, 14
United States v. Coop. Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973) 11
United States v. Ekelman & Assoc., 532 F.2d 545 (6th Cir. 1976) 11
United States v. First Nat'l Bank of Cicero, 957 F.2d 1362 (7th Cir. 1992) 11
United States v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000) 12
United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977) 11
United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966) 11
United States v. Rivera, 55 F.3d 703 (1st Cir. 1995) 11
United States v. Thomas, 709 F.2d 968 (5th Cir. 1983) 11

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 10
Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 14

STATUTES & RULES

False Claims Act,
31 U.S.C. § 3730(b)(2) 2
31 U.S.C. § 3730(c)(3) 9
31 U.S.C. § 3730(e)(4)(A) ..... *passim*
31 U.S.C. § 3730(e)(4)(B) ..... *passim*
Fed. R. Civ. P. 59(e) 4, 5

Petitioner, Dr. John A. King, is a *qui tam* relator whose False Claims Act complaint against respondents[1] was dismissed by the district court under the public disclosure/original source provisions of the Act, 31 U.S.C. § 3730(e)(4). That dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit, and petitioner now seeks review by this Court. He claims that this case, on the record as developed in the courts below, presents two questions of interpretation of the False Claims Act on which the courts of appeals are divided.

One of the two asserted issues, concerning the meaning of "based upon" in § 3730(e)(4)(A), is in fact the subject of a well-developed split in the circuits. It is, however, a matter of little practical consequence upon which this Court has already denied certiorari at least five times since a conflict arose. In addition, it was expressly held to be waived by the court below, and that conclusion is clearly correct. Petitioner never raised this issue in any form in the district court, not even in a footnote in his principal brief, or in either of the two petitions for reconsideration that he filed there.

The other claimed conflict among the circuits, concerning the voluntary disclosure requirement of § 3730(e)(4)(B) that must be satisfied in order to qualify as an original source, is wholly imaginary. Here, Dr. King argues he made the required voluntary disclosure, even as he withheld from the government both his own identity and that of the supposed perpetrators of the alleged fraud. No case from any circuit remotely suggests that the Tenth Circuit's rejection of this unappealing contention was incorrect.

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[1] This brief in opposition is submitted on behalf of all defendants named in that complaint: Hillcrest Health Center, Inc., Harvey Drapkin, D.O., John B. Hughes, D.O., Richard J. Langerman, Sr., D.O., Tom W. Ewing, D.O., Anthony L. Cruse, D.O., Raymond Dieter, D.O., Mona Motz, D.O., Glenn J. Smith, D.O., and Joe Goldstein, D.O.

COUNTERSTATEMENT

Respondents offer this counterstatement, in order to address relevant facts and procedural history omitted or misstated in the Petition.

On March 19, 1997, Dr. King filed a retaliatory discharge action ("*King I*"), alleging that certain of the respondents retaliated against him for complaining about Medicare fraud and for his refusal to participate in these fraudulent schemes. That action was settled by the parties and dismissed with prejudice in February 1999. (Pet. App. 2a.)

In November 1997, Dr. King's attorney, Mr. Loegering, met with the United States Attorney's Office, and provided information about several allegedly fraudulent schemes. (Pet. App. 7a.) In the course of that meeting, and at all times prior to filing of Dr. King's *qui tam* complaint, Dr. King and his lawyer declined to provide to the government Dr. King's identity or the identities of the potential defendants, or any written material.

While *King I* was still pending, on February 27, 1998, petitioner filed under seal the present *qui tam* action against respondents alleging Medicare fraud. (Pet. App. 3a.) Petitioner now states that the complaint was filed "along with a 'written disclosure of substantially all material evidence and information' he possessed." (Pet. 3 (quoting 31 U.S.C. § 3730(b)(2)).) This statement is demonstrably incorrect. *See infra* at 4. It repeats one made in petitioner's First Amended Complaint, to the effect that "plaintiff ha[d] provided to the Attorney General of the United States, and the United States Attorney for the Western District of Oklahoma, *simultaneously with* the filing of this complaint, a statement of

all material evidence and information relating to the complaint." (A18-A19 (emphasis added).)[2]

The United States declined to intervene in Dr. King's *qui tam* action, and the complaint was unsealed and served on respondents in June of 1999. (Pet. App. 3a.) Respondents filed separate motions to dismiss, asserting both (i) that the district court lacked subject matter jurisdiction over the complaint because the allegations upon which it was based had been publicly disclosed in *King I*, and (ii) that the action was barred under the doctrine of *res judicata*, based on the resolution of *King I*. (Pet. App. 3a.)

At no time in the district court did petitioner assert the argument now offered as the first question for this Court's review — that the statute's bar to jurisdiction of actions "based upon the public disclosure" only applies where relator's *qui tam* allegations were actually derived from the public disclosure. Instead, he argued that he satisfied the "original source" exception to that jurisdictional bar. (*See, e.g.*, A245-A254.) The district court, relying on petitioner's untrue assertions that he had provided the information to the government before the complaint was filed, ruled that he satisfied the requirements to be an original source. (*See* Pet. App. 3a-4a.) However, the court nonetheless ordered the case dismissed, on the ground that petitioner's complaint was barred on *res judicata* grounds as a result of the dismissal with prejudice of *King I*. (Pet. App. 4a.)

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[2] In his district court brief in opposition to respondents' motions to dismiss, Dr. King alleged both that he provided this material to the government "*simultaneously with* instituting the instant action," and "*prior to*" filing the action. (A245, A248 (emphasis added).) Both statements are false.

References to the Appellant's Appendix filed in the United States Court of Appeals for the Tenth Circuit are designated as A__.

Petitioner moved for reconsideration under Fed. R. Civ. P. 59(e). On February 8, 2000, the United States filed an *amicus curiae* brief, supporting petitioner on the *res judicata* issue, but stating that it had "no record of the relator providing any information to the government on which the allegations in the *qui tam* are based at any point prior to February 27, 1998, the date the complaint was filed." (Pet. App. 4a.)

The district court issued an order on February 14, 2000 inviting all parties to respond to the "arguments, authorities, and statements" raised in the government's *amicus* brief. (Pet. App. 4a.) Petitioner filed no response to the government's allegations. (*Id.*) On February 29, the district court dismissed the action for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) and vacated its prior order based on *res judicata* grounds. (Pet. App. 5a.)

Petitioner next filed a motion for reconsideration of the district court's February 29 order. Petitioner attached to this motion a copy of a letter transmitting written materials about his fraud allegations to the United States Attorney's Office. This letter was dated March 3, 1998 — four days *after* the complaint was filed on February 27. (A397-A398.) Confronted with this discrepancy, petitioner acknowledged that he had "inadvertently misstated that 'Dr. King provided detailed information organized in notebooks to the U.S. Attorney in Oklahoma and the Department of Justice prior to filing this action,' and 'simultaneously with the filing.'" (A435.) Petitioner's counsel asserted, however, that he had orally provided some information to the government at the November 1997 meeting and that he had offered to provide additional information and to make his client available for an interview. (Pet. App. 6a-7a.)

In response, the United States Attorney's Office filed an affidavit from Assistant U.S. Attorney Cox detailing the November 1997 meeting with Mr. Loegering. (Pet. App. 7a.) AUSA Cox stated that the meeting was "general in nature, on

a no-name basis," with "an actual proffer" to come at some future point. (*Id.*) As petitioner's counsel has acknowledged, no such proffer occurred before the *qui tam* complaint was filed. On April 9, 2000, the district court denied petitioner's second motion for relief under Rule 59(e).

On appeal, the Tenth Circuit affirmed the district court's dismissal on subject matter jurisdiction grounds. The court first determined that petitioner had failed, in the district court, to contest whether *King I* constituted a public disclosure and whether his *qui tam* complaint was based upon that public disclosure:

> King essentially conceded both issues when he jumped past these issues and argued only that he qualified as an original source in opposing the defendants' original motions to dismiss.[3]

(Pet. App. 11a.) The Tenth Circuit went on to hold that, "even assuming that one or all of these issues had been timely raised before the district court," (Pet. App. 11a), under *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), *King I* constituted a public disclosure, and the *qui tam* action was

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[3] The Tenth Circuit noted that, in a footnote, the relator had cited the district court to two out-of-circuit district court cases said to hold that the public disclosure bar did not arise from prior litigation, but also to the Tenth Circuit's contrary decision in *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), which he made no effort to distinguish. (Pet. App. 11a.)

Petitioner's discussion to which the Tenth Circuit referred was located in a footnote within a section of petitioner's opposition to the motion to dismiss headed "Dr. King is An 'Original Source' And The Court Has Subject Matter Jurisdiction" and sub-headed "Dr. King Properly Provided Information To The Government Before Filing This Action." (A245.) At no point in that or any other district court filing did petitioner assert the narrow definition of "based upon the public disclosure" on which he now asks this Court to grant certiorari.

based upon it because "its allegations share a substantial identity with the allegations in" that case. Accordingly, the court held that the public disclosure bar applied. (Pet. App. 11a-12a.)

Finally, the court held that, because Dr. King had deliberately withheld his own identity and that of the potential defendants from the government before he filed his complaint, he did not qualify as an original source under section 3730(e)(4)(B) and therefore the district court lacked jurisdiction. (Pet. App. 12a-16a.)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI ON THE ISSUE CONCERNING THE MEANING OF "BASED UPON" UNDER 31 U.S.C. § 3730(e)(4)(A) BECAUSE IT DOES NOT MERIT REVIEW AND BECAUSE THE PETITIONER WAIVED THE ARGUMENT BELOW

A. This Issue is of Limited Practical Consequence, and this Court has Denied Certiorari in at Least Five Cases Since a Conflict in the Circuits Arose

Since 1994, there has been a split in the circuits over the proper interpretation of the term "based upon" in 31 U.S.C. § 3730(e)(4)(A).[4] While the split is clear, it is one whose

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[4] Presently, nine circuits hold that qui tam allegations are "based upon" a public disclosure if those allegations are "supported by" or "substantially identical" to the information that was publicly disclosed. *See Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, __ F.3d __, 2002 WL 59279, at *11-*12 (8th Cir. 2002); *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539-40 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999); *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *United States ex rel. Findley v.*

consequences are quite limited. For reasons explained more fully below, there is no compelling reason for this Court to grant review of this issue, either now or ever. Not surprisingly, since 1994, in at least five cases, this Court has denied petitions for certiorari which squarely presented this issue and highlighted the existence of a conflict. *See* Petition for Certiorari, *United States ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, No. 99-969, at 16-23 (U.S. Dec. 8, 1999), *cert. denied*, 529 U.S. 1018 (2000); Petition for Certiorari, *United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr. Univ.*, No. 98-1268, at 9-17 (U.S. Jan. 28, 1999), *cert. denied*, 526 U.S. 1066 (1999); Petition for Certiorari, *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, No. 97-850, at 11-16 (U.S. Nov. 21, 1997), *cert. denied*, 522 U.S. 1077 (1998); Petition for Certiorari, *United States ex rel. Findley v. FPC-Boron Employees' Club*, No. 97-157, at 6-10 (U.S. June 16, 1997), *cert. denied*, 522 U.S. 865 (1997); Petition for Certiorari, *United States ex rel.*

FPC-Boron Employees' Club, 105 F.3d 675, 682-84 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997); *Fed. Recovery Serv., Inc., v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552-54 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

Two circuits take the view that qui tam allegations must actually be "derived from" the public disclosure in order to be "based upon" it for purposes of the public disclosure bar. *United States v. Bank of Farmington*, 166 F.3d 853, 863-64 (7th Cir. 1999); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-48 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994).

The decision below does nothing to deepen or extend this conflict. It simply applies, as an alternative basis for dismissal and without elaboration, the decision of the Tenth Circuit in *Precision*, 971 F.2d at 552-54, which was among the first appellate cases to address the issue following the section's enactment in 1986.

Siller v. Becton Dickinson & Co., No. 94-106, at 12-15 (U.S. July 15, 1994), *cert. denied*, 513 U.S. 928 (1994).

Where a suit is found to be "based upon [a] public disclosure," in order to proceed, the relator must then establish himself as an "original source" — that is, show himself to have "direct and independent knowledge of the information" on which the suit is based, and to have "voluntarily provided the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4). Thus, the narrower concept of "based upon" advocated by petitioner, which imposes the public disclosure bar only where a relator's information is actually "derived from" the public disclosure, triggers the original source requirement in a relatively narrow class of cases. The majority rule, applied below, which finds suits to be "based upon the public disclosure" whenever the suit's allegations are supported by or substantially identical to the public disclosure — regardless of where relator learned of them — imposes the "original source" requirement in a larger proportion of cases. In both instances, though, any party who can show both direct and independent knowledge, and the required voluntary disclosures to the government, is allowed to go forward. Only persons unable to do so are foreclosed.

Thus, if the position of nine courts of appeals, including the Tenth Circuit here, is correct, the "derived from" interpretation of "based upon" accepted in the Fourth and Seventh Circuits is incorrect. Such an error, if it be, in the law of the Fourth and Seventh Circuits *may* mean that relators in a handful of cases are being improperly allowed to proceed, when they should have been barred unless they prove direct and independent knowledge and make the required pre-filing voluntary disclosure. On the other hand, if the rule followed below — and in the great majority of circuits — is wrong, then too many relators in too many cases in these circuits are being required to show that they are an original source. And a few, who cannot make that showing, *may* have their cases thrown out of court. But this theoretical group of ultimately-

affected relators is substantial neither in number nor in the equities of their position. The inability to show that one is an original source means that he either lacks direct and independent knowledge of the information in the complaint, or failed to share it with the government in a timely manner. Given the purposes of the False Claims Act — to provide incentives to true whistleblowers and to bar parasitic lawsuits, *see, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) — the theoretical possibility that a few such relators could be foreclosed does not merit this Court's attention.

The Court's persistent decision to deny review of this issue in the face of a conflict is unsurprising for other reasons as well. First, the substantive rights of the real parties in interest — the United States and the defendants — will not be affected by the resolution of this issue. The United States reviews all False Claims Act complaints before they are served, and is still able to intervene in cases and prosecute actions in which the district court is found to lack subject matter jurisdiction over the relator's claim because of the public disclosure bar. *See, e.g., Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) ("The United States may properly intervene in a suit by a putative source regardless of jurisdictional failures in the underlying suit."); 31 U.S.C. § 3730(c)(3) (where government does not initially intervene, it may intervene at any time during pendency of suit, upon a showing of good cause). Similarly, the substantive provisions of the False Claims Act — and the concomitant obligations of government contractors — are unaffected no matter which definition of "based upon" is correct.

In addition, the existing conflict on the meaning of "based upon" is just one of many that now exist in the circuit courts, relating to the complex and ambiguous provisions of the False Claims Act. Respondents' thorough but perhaps not exhaustive research reveals a number of significant issues on

which various circuits have taken contrary positions.[5] A number of such issues deal with matters of substantive consequence to the rights of defendants and of the United States, such as what constitutes a violation of the Act, and what rights the United States has to control a suit in which it does not intervene:

1. Whether municipalities, counties and other governmental entities which are not arms of the state may be liable under the False Claims Act after this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 783-84 (2000);[6]

2. Whether there must be proof of financial loss to the government to support a claim under the False Claims Act;[7]

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[5] The following list excludes several conflicts, of continuing though limited relevance, in interpretation of the Act's provisions as they existed prior to the 1986 amendments.

[6] *Compare United States ex rel. Dunleavy v. County of Del.*, No. 00-3691, 2002 WL 111365, at *6 (3d Cir. Jan. 29, 2002) (holding that local government cannot be subject to suit under False Claims Act because Act mandates punitive damages); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 491-92 (5th Cir. 2001) (holding that counties and local government entities are not "persons" under the FCA and, therefore, not subject to liability under the FCA), *cert. denied*, 122 S. Ct. 808 (2002), *with United States ex rel. Chandler v. Cook County, Ill.*, Nos. 00-4110, 01-1810, 2002 WL 75859, at *10 (7th Cir. Jan. 22, 2002) (holding that counties are "persons" under FCA and subject to same penalties as other defendants).

[7] *Compare Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3rd Cir. 2001) (holding that liability does not attach under the FCA unless a false claim would result in economic loss to the government), *with Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001) (holding that government can recover statutory penalties under the FCA even if no actual economic loss is proven); *Commercial Contr., Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir. 1998) (same); *United States v. Rivera*,

3. Whether the subject matter of a false statement must be the actual source of the government's loss or whether a "but for" relationship is sufficient to permit recovery for damages in a false certification case;[8]

4. Whether an implied certification of regulatory compliance can constitute a basis for liability;[9]

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55 F.3d 703, 709 (1st Cir. 1995) (same); *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966) (same) *and with Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4th Cir. 1999) (no requirement that government suffer economic loss); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995) (same), *vacated on other grounds*, 520 U.S. 939 (1997).

[8] *Compare United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995) (holding that the subject matter of the false statement must be the source of the government's loss); *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983) (same); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977) (same); *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 62-63 (8th Cir. 1973) (same), *with United States v. First Nat'l Bank of Cicero*, 957 F.2d 1362, 1374 (7th Cir. 1992) (holding that a "but for" relationship between the false statement and the government's damages is sufficient); *United States v. Ekelman & Assoc.*, 532 F.2d 545, 550-51 (6th Cir. 1976) (same).

[9] *Compare Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (1994) (holding that implied certification can constitute the basis for FCA liability), *aff'd without opinion*, 57 F.3d 1084 (Fed. Cir. 1995); *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531-33 (10th Cir. 2000) (same), *with United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996) (holding that no FCA liability exists unless an express false certification is made); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (same).

5. Whether the government can block a settlement in a False Claims Act case in which it did not intervene;[10] and

6. Whether the general statute of limitations under the False Claims Act applies to retaliation claims brought under the Act.[11]

Other circuit conflicts currently exist on various issues relating to the ambiguous provisions of the public disclosure/original source rules:

7. Whether information revealed to corporate employees or learned during a corporate internal investigation constitutes a public disclosure;[12]

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[10] *Compare United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (holding that if the government chooses not to intervene it cannot later block settlement), *with Searcy v. Philips Elec. N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (holding that the government can block a settlement even if it did not intervene); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) (holding that the government can block a relator's voluntary dismissal even if it did not intervene).

[11] *Compare Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994) (holding that FCA statute of limitations applies), *with United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 & n.4 (9th Cir. 1998) (applying closest state statute of limitations).

[12] *Compare Doe v. John Doe Corp.*, 960 F.2d at 322-23 (holding that disclosure to corporate employee is public disclosure), *with Schumer*, 63 F.3d at 1518 (holding that disclosure to corporate employee is not public disclosure); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 n.4 (10th Cir. 1996) (same).

8. Whether unfiled discovery materials can constitute a "public disclosure;"[13]

9. Whether the list of ways in which a public disclosure may occur under section 3730(e)(4)(A) is exclusive;[14]

10. Whether a relator must have had a hand in the public disclosure in order to be an original source;[15] and

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[13] *Compare United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) (holding that discovery material which is only theoretically available is not publicly disclosed); *Ramseyer*, 90 F.3d at 1519 (same); *Springfield Term. Ry.*, 14 F.3d at 652 (same), *with United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (holding that information disclosed during discovery is publicly disclosed).

[14] *Compare United States ex rel. Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999) (holding that list is exclusive); *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999) (same); *United States ex rel.Dunleavv v. County of Del.*, 123 F.3d 734, 744 (3d Cir. 1997) (same); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513 n.2 (8th Cir. 1994) (same); *Doe v. John Doe Corp.*, 960 F.2d at 323 (same); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991) (same); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990) (same), *with A-1 Ambulance v. Cal.*, 202 F.3d 1238, 1244 (9th Cir.) (broadly interpreting list), *cert. denied*, 529 U.S. 1099 (2000); *United States ex rel. Fine v. Advanced Sci., Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) (same).

[15] *Compare United States ex rel. Dhawan v. N.Y. Med. College*, 252 F.3d 118, 121 (2d Cir. 2001) (holding that the *qui tam* plaintiff must have had hand in public disclosure); *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (same), *with Bank of Farmington*, 166 F.3d at 865 (holding that *qui tam* plaintiff need not be source of public disclosure); *Siller*, 21 F.3d at 1351 (same); *Fine*, 99 F.3d at 1007 n.5 (same); *Cooper*, 19 F.3d at 568 n.13 (same); *Findley*, 105 F.3d at 690 (same).

11. Whether a relator must have revealed the allegations to the government before the public disclosure in order to be an original source.[16]

For the reasons set forth above, the conflict over the proper interpretation of the term "based upon" is far from the most important of those that now exist under the Act. It can certainly wait until the Court takes up some of the more substantive conflicts that have arisen under the Act, during which time the issue may already have been resolved by the actions of the minority circuits or comments in this Court's opinions.

B. As the Tenth Circuit Held, the Issue was Waived in the District Court

Entirely apart from the foregoing discussion, certiorari should be denied because the "based upon" issue was not raised in the district court, and was therefore waived. The Tenth Circuit expressly so concluded. It stated that petitioner "essentially conceded [this and another issue] when he jumped past these issues and argued only that he qualified as an original source in opposing defendants' original motions to dismiss." (Pet. App. 11a (footnote omitted).) *See also United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) (relator waived argument supporting jurisdiction over *qui tam* action). That conclusion is clearly correct, as the "based upon" issue was never raised at any time, in any form, in the district court, notwithstanding ample opportunity to do so. The court thus held that the issue had not been preserved for review, but, in any event, went on to conclude that petitioner's interpretation of the "based upon"

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[16] *Compare Findley*, 105 F.3d at 690-91 (holding that relator must disclose allegations to government before public disclosure to qualify as original source); *McKenzie*, 123 F.3d at 943 (same), *with Minnesota Ass'n of Nurse Anesthetists*, 2002 WL 59279, at *14 (rejecting additional requirement that relator provide information to government before public disclosure).

language was contrary to the Tenth Circuit's binding precedent in *Precision.*

This Court should decline review for this reason as well.

II. THIS COURT SHOULD DENY CERTIORARI ON THE QUESTION WHETHER A RELATOR QUALIFIES AS AN "ORIGINAL SOURCE" UNDER 31 U.S.C. § 3730(e)(4)(B) WHEN, IN HIS PRE-FILING VOLUNTARY DISCLOSURE, HE DELIBERATELY WITHHELD FROM THE GOVERNMENT HIS IDENTITY AND THE IDENTITY OF THE ACCUSED

A. There is no Conflict in the Circuits

On his second question presented, relating to the requirements of the voluntary disclosure prong of the original source provisions, 31 U.S.C. § 3730(e)(4)(B), petitioner attempts to conjure up a circuit split by misstating the holding of the court below and contrasting it with a mischaracterization of the D.C. Circuit's decision in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d at 657.

He states, first, that the Tenth Circuit has imposed on relators a "total disclosure" rule, meaning, he claims, that "the Tenth Circuit ruled that '*the information*' to be provided under section 3730(e)(4)(B) means all the information the relator possesses." (Pet. 12 (emphasis in original).) In fact, in its own words, the Tenth Circuit decided the narrower question "whether a relator qualifies as a 'source' if in making his pre-filing disclosure he withholds his identity and the identities of the potential defendants." (Pet. App. 14a-15a.) The court below reasoned that the obligation to voluntarily disclose "the essential elements or information on which the qui tam allegations are based" (Pet. App. 14a) clearly extends to "[t]he identities of the accuser and the accused . . . ." (Pet. App. 15a.) It therefore concluded that petitioner's failure to provide his identity or that of the accused to the government

"kept him from meeting the jurisdictional requirements of an original source." (Pet. App. 16a (footnote omitted).) The court below never referred to a "total disclosure" rule, although petitioner uses those words at least ten times in his petition to characterize the court's holding.

Relator seeks to contrast the decision below with the holding of the D.C. Circuit in *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d at 657. But the *Springfield Terminal* case in no way suggested that a relator could be an "original source" while deliberately withholding critically relevant information known to him, such as his or the potential defendants' identities. In fact, *Springfield Terminal* does not address the pre-filing voluntary disclosure requirement at all. Instead, the D.C. Circuit found that "§ 3730(e)(4)(B) does not require that the *qui tam* relator *possess* direct and independent knowledge of all of the vital ingredients to a fraud transaction." *Id.* at 656-57 (emphasis added). Because the relator there possessed direct and independent knowledge of an essential element of the fraud transaction, though not of the entire fraud scheme, the court found that the original source requirement was satisfied. *Id.* at 657. That decision is consistent with the decision below in all respects.

B. The Tenth Circuit's Application of the Voluntary Disclosure Requirement is Clearly Correct

Notably absent from petitioner's argument is a sound rationale for why a relator should be permitted to withhold such crucial information and still satisfy the voluntary disclosure prong of the original source requirement. The primary purpose of the False Claims Act is "encouraging disclosure and aiding prosecution of fraud on the government." *Mistick*, 186 F.3d at 391. That purpose is ill-served by petitioner's unsupported suggestion that he can satisfy the statute while holding his cards close to his vest and withholding information as to identity that is essential to the

government's ability to dig deeper. As the Tenth Circuit recognized (Pet. App. 15a), petitioner's failure to provide this critical information to the government hampered its ability to investigate these allegations, since it was unable to focus on any particular target of investigation or assess the reliability of what it had been told. That withholding of information thus thwarted the primary objective of the False Claims Act.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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